Virginia Law Register

VOL. VIII.] DECEMBER, 1902. [No. 8.

CONSTITUTIONAL PROVISIONS AGAINST DAMAGING PRIVATE PROPERTY.

IN the constitution of many of the states at present will be found a provision to the effect that private property shall not be "taken or damaged" for public use without just compensation. In the former constitutions of these states the provision related only to the "taking" of such private property. To determine the change made by the insertion of the words "or damaged" is the object of this paper.

All these clauses are inserted into the constitutions by the people of the states for the purpose of regulating the exercise by the state, or by some person authorized by the state, of the right of eminent domain.

Eminent Domain—Definition—This right has been variously defined by the text writers and other authorities. Judge Cooley[1] defines it as "the rightful authority which exists in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience or welfare may demand."

Judge Dillon[2] defines it as "the right of every government to appropriate, otherwise than by taxation and its police authority, private property for public use."

"Taking" private property for public use—From these definitions it will be seen that the state has the power to take private property when it is necessary for the public good, and, in the absence of restrictions in the constitution, the payment to the citizen of the value of the property taken is not a condition, precedent or subsequent, to the taking. It was to protect the citizen that the provisions were inserted into the constitutions.

[1] Constitutional Limitations, 649. [2] 1 Munic. Corp. (4th ed.), 584.

The old sections provided, in effect, that private property should not be "taken" without just compensation. Since these words were inserted for the protection of the citizen, one would not expect that they would be construed strictly against the citizen. Yet such was the result.

Influenced possibly by reasons of public policy, to encourage improvements, the courts so construed the meaning of the words in the provision that the result was, that in order that there should be liability, there must have been some trespass upon or actual appropriation of the corpus of the estate. Judge Dillon[3] thus states the law in respect to municipal corporations:

"Municipal corporations, acting under authority conferred by the legislature to make, repair or to grade, level or improve streets, if they keep within the limits of the streets and do not trespass upon or invade private property, and exercise reasonable care and skill in the performance of the work resolved upon, are not answerable to the adjoining owner, whose lands are not actually taken, trespassed upon or invaded, for consequential damages to his premises, unless there is a provision in the constitution of the state or in the charter of the corporation or in some statute creating the liability."

In this way the spirit of the provision was entirely disregarded.

It is submitted that a proper interpretation of the meaning of the word "property" would have prevented, in a great measure at least, this conclusion reached by the courts. In its highest and proper sense, property includes all the rights which relate to things, real or personal. The *right,* not the *thing,* constitutes the property. If this meaning of the word had been followed by the courts in construing the provisions, there would probably have been no occasion for the insertion of the words "or damaged" into the constitution.

By the construction put upon the provisions, however, many injuries, which were takings of property in this high sense of the word, were suffered, for which there was no redress. The construction practically excluded from the scope of the word "property" everything except the actual corpus of the estate.

In this state of the law, and to protect these unprotected rights of the citizens, the states inserted into their constitutions the words "or damaged."

The people of the state of Illinois were the first to essay to

[3] 2 Munic. Corp. 990.

remedy this defect in the constitution caused by the strict construction put upon the words "property" and "taking" by the courts. In 1870 they inserted into their constitution a provision prohibiting the "damaging" of private property as well as the "taking." The example was followed by many states. For the sake of certainty, these provisions are quoted in the following paragraphs *verbatim,* and in the order of their insertion into the constitutions of the several states—the date of their adoption being shown in parenthesis.

CONSTITUTIONAL PROVISIONS IN VARIOUS STATES AGAINST "DAMAGING."

Illinois (1870): "Private property shall not be taken or damaged for public use without just compensation."[4]

West Virginia (1872): The same as in Illinois.[5]

Pennsylvania (1873): "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for the property taken, injured or destroyed by the construction or enlargement of its works, highways or improvements, which compensation shall be paid before such taking, injury or destruction."[6]

Arkansas (1874): "Private property shall not be taken, appropriated or damaged for public use without just compensation therefor."[7]

Missouri (1875): The same as in Illinois.[8]

Nebraska (1875): The same as in Illinois.[9]

Colorado (1876): "Private property shall not be taken or damaged for public or private use without just compensation."[10]

Texas (1876): "No person's property shall be taken, damaged or destroyed for, or applied to, public use without adequate compensation being made, unless by consent of such person."[11]

Georgia (1877): "Private property shall not be taken or damaged for public purposes without just and adequate compensation being first made."[12]

California (1879): Practically the same as in Illinois.[13]

Louisiana (1879): The same as in Colorado.[14]

Washington (1889): Practically the same as in Illinois.[15]

[4] Art. 2, sec. 13.
[5] Art. 3, sec. 9.
[6] Art. 1, sec. 22.
[7] Art. 2, sec. 22.
[8] Art. 2, sec. 21.
[9] Art. 1, sec. 21.
[10] Art. 2, sec. 15.
[11] Art. 1, sec. 17.
[12] Art. 1, sec. 3.
[13] Art. 1, sec. 14.
[14] Art. 1, sec. 32.
[15] Art. 1, sec. 16.

South Dakota (1889): "Private property shall not be taken for public use, or damaged, without just compensation as determined by a jury."[16]

North Dakota (1889): The same as in California.[17]

Montana (1889): "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner."[18]

Mississippi (1890): "Private property shall not be taken or damaged for public use except upon due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law."[19]

Utah (1890): The same as in Illinois.[20]

Kentucky (1891): "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed, which compensation shall be paid."[21]

Virginia (1902): "It [the legislature] shall not enact any law whereby private property shall be taken or damaged for public uses, without just compensation."[22]

JUDICIAL CONSTRUCTION OF THE DAMAGE CLAUSE.

We shall now proceed to examine the decisions in the various states and attempt to show the true effect of the insertion of the words "or damaged."

1. Illinois.

As has been seen, Illinois was the first state to adopt the clause in question, and we shall now examine the construction put upon the words by the courts of that state. Probably the case most frequently cited in questions of the construction of the words in other constitutions is the case of *Rigney* v. *Chicago*.[23] The facts are as follows:

Rigney owned an improved lot on Kinzie street, in the city of Chicago; at a point 220 feet distant from Rigney's property, Kinzie street was intersected by Halsted street. The city built on Halsted street a viaduct over Kinzie street in such a way that Halsted street could be reached by Kinzie street only by means of stairs. The court held that Rigney's property was "damaged"

[16] Art. 6, sec. 13.
[17] Art. 1, sec. 14.
[18] Art. 3, sec. 14.
[19] Art. 3, sec. 17.
[20] Art. 1, sec. 16.
[21] Art. 4, sec. 242.
[22] Art. 4, sec. 58.
[23] 102 Ill. 64.

within the meaning of the constitution. In a passage frequently cited, the court lays down the rule thus:

"In all cases, to warrant a recovery, it must appear that there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property, in excess to that sustained by the public generally. In the absence of any statutory or constitutional provision on the subject, the common law affords redress in all such cases, and we have no doubt that it was the intention of the framers of the present constitution to require compensation to be made in all cases where, *but for some legislative enactment, an action would lie by the common law.*"

This case settled the law in Illinois, that the clause in question gives no new right of action, but only preserves the right of action where there would be one by the common law.

In *Nevins* v. *Peoria,*[24] the court reached the conclusion that:

"Although a city has power and authority to elevate and depress the grade of its streets, as it may deem proper, yet if, in so doing, it inflicts an injury upon the lot-owner, peculiar to him alone, it can not be exempted from liability; and should it become necessary for the interests of the public, in the process of grading the streets, or, we may add, laying down a railroad track thereon, that the lot of the individual shall be rendered unfit for occupancy wholly or in part, the public must pay for it, and to the extent to which it deprives the owner of its legitimate use."

In *City of Pekin* v. *Brereton,*[25] it was held that where the city granted to a railroad the right to lay its tracks along a street, and the railroad in laying its tracks made excavations obstructing the use of plaintiff's property and endangering its stability, the city was liable.

For the other Illinois cases to the same effect see the foot-note.[26]

But in *Lake Erie etc. Ry.* v, *Scott*[27] the court seems to depart from the rule that the constitution gives the right of action only where there would be one at common law. In this case it was held that, under the constitutional provision, a railroad which constructs its road along a highway is liable to the owner of a farm on the opposite side of the highway for depreciation in the value of his farm, caused by the construction and operation of the railroad so near the highway as to render it unsafe. Conger, J., says:

[24] 41 Ill. 502.

[25] 67 Ill. 477, 16 Am. Rep. 629.

[26] Stone *v.* Fairbury etc. R. Co., 68 Ill. 394, 18 Am. Rep. 556; Chicago etc. Ry. *v.* Berg, 10 Ill. App. 607; Chicago etc. Ry. *v.* Ayers, 106 Ill. 518; Chicago *v.* Taylor, 125 U. S. 161.

[27] 24 N. E. 78 (Ill. App.).

"It is urged that the damages claimed arose not from any physical invasion or disturbance of appellee's property or actual encroachment on the highway, but alone from the injury to the use and enjoyment thereof caused by the operation of the railroad; that such operation being lawful and confined to the appellant's right of way, the damages arising therefrom to the appellee would be *damnum absque injuria*. We admit there is force in this objection, and as far as we are aware this precise question has not been passed upon by the Supreme Court. The nearest approach to it is in the case of *Rigney* v. *Chicago*.[28]

"We are of the opinion that there is no good cause for distinguishing between an injury arising from an interference with appellee's right to the advantages the highway gave his farm, caused by a physical obstruction placed thereon, as in the foregoing case, where the same kind of injury is produced by the operation of trains beside it. Such operation being lawful and confined to the right of way does not release appellant from liability, for it would clearly be liable for damages caused by an unlawful act, and as we understand the constitutional provision that 'private property shall not be taken or damaged for public use without just compensation,' it means to cover cases where damages are caused by acts that are legal and entirely within the powers of the corporation performing them, but in the doing of which for the use and benefit of the public, private property is damaged. It follows that appellant's proposition that 'a corporation is not liable unless an individual doing the same thing on his private property would be,' as applied to this case, is not sound."

This case seems to be against the current of the Illinois decisions, but may possibly be reconciled on the ground of nuisance.

In *Shroeder* v. *City of Joliet*[29] the court reaffirms the "common law" rule. In this case, on the question of liability of a city for cutting down a street, the court says:

"In this case it is alleged that there is damage to appellant's property by depriving it of lateral support. There is incident to land in its natural condition a right of support from the adjoining land, and every owner is entitled to have his soil in its natural state sustained when necessary by the lateral support of the adjoining soil. This right of lateral support is one which an owner enjoys in connection with his property, and if he sustains damages by its withdrawal by the adjoining owner, he is entitled to compensation."

In other words, the right of lateral support is a common law right, and when this right is impaired there is a right of action.

Thus it will be seen that the rule in Illinois is, that under the constitutional clause in question, there is a right of action *where, in absence of statutes on the subject, there would be a right of action by the common law.*

[28] *Supra.*

[29] (1901) 59 N. E. 550, 189 Ill. 48.

2. Pennsylvania.

The decisions of the Pennsylvania court have also been of great influence in the decision of this question, being frequently quoted and followed.

One of the first, as it is one of the most important, cases decided in that state is the case of *Railroad* v. *Lippincott.*[30] In this case it was held that

"A railroad company, constructing and operating an elevated railroad upon property owned by it in fee-simple, fronting on one side of the street, is not liable under the provision of Art. 16, sec. 8 of the constitution of Pennsylvania, or otherwise, for depreciation in the value of property fronting upon the opposite side of the street, in consequence of the noise, disturbance, smoke, sparks and vapors necessarily resulting from the operation of the road as a steam railway, where no part of said last mentioned property, or any right of way, or other appurtenant thereto belonging, has been taken or used in the erection or construction of the road."

The case holds that the effect of the clause in the constitution was to place corporations upon the same plane with individuals as regards liability for injuries to property, and that it only made a corporation liable where an individual was liable at common law.

The decision was rested on the following grounds: (1) One constructing and operating a railway on his own land is not responsible for damage done to adjacent property by ordinary and usual methods of operation. (2) Art. 16, sec. 8 of the constitution is not applicable unless some property be taken, or some right of way or other appurtenant thereto belonging, has been taken or used in the construction. (3) The ordinary and proper method of operating a railway is not a nuisance, and inasmuch as an individual would not be liable to damages for so operating a railway on his own land, neither is a corporation.

Probably the most frequently cited Pennsylvania case on this subject is *Railroad Co.* v. *Marchant.*[31] This case holds that the constitutional provision applies only to such injuries as *are capable of being ascertained at the time the work was being constructed or enlarged,* and that for injuries arising from the operation of a railroad, without negligence or lack of skill, such as annoyance from smoke, cinders, noise, etc., the company is not liable any more than a private person would be for injuries arising without his fault from the lawful use of his own property. In other words, the railroad is not liable unless its operation amounts to a nuisance.

[30] 9 Atl. 117.

[31] 13 Atl. 690.

Judge Paxson says, in the course of his opinion:

"We understand the word 'injury', or 'injured', as used in the constitution, to mean such a legal wrong as would be the subject of an action for damages at common law. For such injuries both corporations and individuals now stand upon the same plane of responsibility."

By these decisions the doctrine of *damnum absque injuria* is not overturned.

See other Pennsylvania cases cited in foot-note.[32]

These cases establish the doctrine in Pennsylvania that by the provision individuals and corporations are put on the same footing.

3. GEORGIA.

In Georgia the court arrived at the same conclusion in the case of *Austin* v. *Railway Co.*[33] This is one of the best considered cases in the books, collecting all of the Georgia authorities, and showing the rule to be the same as in Pennsylvania.

In the syllabus of the case, prepared by Judge Simmons, the decision is stated as follows:

(1) In that clause of the constitution providing that private property shall not be "taken or damaged" for public purposes without just and adequate compensation being first made, the word "damaged" is used in its usual sense as a law term, and does not change the substantive law of damages or create a cause of action where none previously existed; nor does it abrogate the principle expressed in the phrase *"damnum absque injuria,"* but it does preserve all existing causes of action for damages to private property, and prohibit exemptions of liability for such damages even if occasioned for public uses.

(2) The word "damaged" in this clause refers to "actionable wrongs," and does not require compensation for depreciation in the value of private property caused by the lawful operation of a public work owned by the corporation vested with the power of eminent domain, unless a private corporation or private individual would be liable for similar acts under the circumstances; nor is a quasi-public corporation liable where private property is depreciated in

[32] Reading v. Althouse, 93 Pa. St. 400; Pusey v. Alleghany, 98 Pa. St. 552; Hendrichs' Appeal, 103 Pa. St. 358; Sydnor v. City of Lancaster, 11 Atl. 872; Sydnor v. Pa. Ry. Co., 55 Pa. St. 340; Jones v. Ry., 25 Atl. 134; New Brighton v. Presbyterian Church, 96 Pa. St. 331.

[33] 47 L. R. A. 755.

value as a result of the lawful use and enjoyment of the company's private property.

(3) To "damage" property within the meaning of the constitution there must be some physical interference with property, or physical interference with a right or use appurtenant to the property, and therefore a railway is not liable to the owner of real property for diminution in the market value thereof, resulting from the making of noise or from the sending forth of smoke or cinders in the prosecution of the company's lawful business, which does not physically affect or injure the property itself, but merely causes personal inconvenience or discomfort to the occupants of the same.

In the course of the opinion the court says:

"The purpose was to make the law of damages uniform so that a plaintiff could recover against a city or railroad under the same circumstances that would have authorized a recovery against those not armed and protected by the power of eminent domain. For example, if, prior to 1877, a manufacturing company had obstructed the street, and thereby inflicted special damages, a property owner so injured could recover; but if identically the same act had been done by a municipality under its charter it would have been just as much 'damage', though the property owner could not recover, because the state's license to obstruct the street was authority for what had been done—a shield and protection affording immunity from what would otherwise have been liability. In both instances it damaged the property, because, while it did not take the corpus of the estate, it yet physically interfered with an easement or right of way appurtenant to the property. But in one case he could recover; in the other he could not. The constitution intended to take away the city's exemption and to leave it and the manufacturing company on an equal footing, ordering that hereafter 'damages', by whomsoever caused, and even if for public purposes, should be paid. But they must be 'damages' in the sense in which the word is used and applied in courts. Thereafter, what is damage by one is damage by all, and what is '*damnum absque injuria*' to one is so to all."

It was suggested in the case that by the ruling of the court, a railway might so operate its road as absolutely to destroy the value of the surrounding property. The court answers this suggestion by a reference to the law of nuisance.[34]

This case was decided in 1899, and contains a review of all the Georgia cases up to that time. It quotes extensively from *Ry. Co.* v. *Marchant*,[35] and follows the ruling in that case.

In Georgia the doctrine is therefore that in respect to "damaging" property, public, or quasi-public and private, corporations

[34] Quoted post, p. 548.

[35] (Pa.) *Supra.*

and individuals stand on the same footing, and only that is a damage which is an "actionable wrong." It will thus be seen that this is practically the same doctrine as that laid down in *Rigney* v. *Chicago*.[36]

The Georgia rule is also well stated in *Peel* v. *Atlanta*,[37] where the test is stated to be:

"Would the injury, if caused by a private person without authority of statute, give the plaintiff a cause of action against such person? If so, then he is entitled to compensation, notwithstanding the statute which legalizes the damaging work. The constitutional or statutory provision simply prevents the defendant from shielding himself under his authority against liability for damages consequent upon the work."

For the other Georgia cases see the foot-note.[38]

In the opinion of the writer, the three states already dealt with present decidedly the best considered opinions.

4. WEST VIRGINIA.

In *Johnson* v. *Parkersburg*,[39] the court, after stating the rule as to taking property and showing its deficiencies, says:

"It was to prevent this manifest injustice that sec. 69 of the Bill of Rights in the constitution of West Virginia was inserted therein by the people. That section is 'private property shall not be taken or damaged for public use without just compensation.' The effect of this section is to declare that a man's property rights shall not be invaded for public use unless he recovers just compensation, and that his right of property shall not be invaded by a damage inflicted upon it, though the property is not taken, as well as that the corpus of the property itself shall be protected from such invasion. When the words 'or damaged' were incorporated into the constitution of West Virginia, in addition to the words, 'private property shall not be taken', the effect was as effectually to protect private property from any damage for public use without just compensation as to prevent it from being taken for the same purpose without just compensation. . . . As we have also seen, before the adoption of our present constitution, no compensation could be recovered for consequential damages inflicted upon private property of an individual by work done for the public good in raising or depressing the streets of the city. It was *'damnum absque injuria'*, that is, an injury without a wrong. It was not contrary to law to thus damage private property, and it was not therefore a wrong, and the party was without redress. But it is different now: the constitution denounces it as a wrong against the individual now to damage his property without just compensation."

[36] (Ill.) *Supra*.

[37] 85 Ga. 138, 8 L. R. A. 787.

[38] Pause *v.* Atlanta, 26 S. E. 489; City of Albany *v.* Sikes, 20 S. E. 257; Atlanta *v.* Green, 67 Ga. 386; Streyer *v.* Geo. &c. R. Co., 15 S. E. 637; Campbell *v.* St. R. Co., 9 S. E. 1078; Georgia R. & Banking Co. *v.* Maddox, 42 S. E. 315 (Aug., 1902).

[39] 16 W. Va. 402.

In a later case the rule is better stated. In *Jordan* v. *Benwood,*[40] the court says:

"The provision of the constitution that private property shall not be taken or damaged for public use without just compensation, does not render a city liable for damages from surface water where a private individual would not be liable. It was not designed to put upon the state, or upon counties or municipalities, subordinate parts of the state government, a burden not resting on private corporations under the same circumstances."[41]

West Virginia, therefore, follows the Georgia rule.

For other cases see the foot-note.[42]

5. ALABAMA.

In Alabama there seems to be no case laying down the principle broadly. Most of the cases are in respect to the grading of streets.

In *Montgomery* v. *Townsend,*[43] the court notes the change in the constitution, but contents itself with saying that the provision is to be construed liberally in favor of the citizens. It restricts the liability of the city to those cases in which there is a "material change, caused by a contingency which could not have been reasonably or fairly foreseen, or made only because the corporate authorities deem that public convenience thereby increased, or to beautify the streets. . . . The dividing line is between what is necessary to safe and convenient use on one hand, and what is in excess thereof and not essential thereto, or mere ornamental, on the other."

The court shows a tendency to follow the Pennsylvania rule, saying: "The same construction has been placed on a corresponding clause of the constitution of Pennsylvania by the Supreme Court of that state, of which ours is a copy."[44] In a second report of the case[45] *Ry. Co.* v. *Marchant*[46] is cited as also upholding the court's construction. The clause in the Alabama constitution is copied from Pennsylvania. This doctrine as to changing the grade of streets was altered by the decision in *Town of Avondale* v. *McFarland.*[47] In this a street was laid out, a part of it passed over ground so low and wet that in order to make it safe for public use it had to be raised. Plaintiff had a lot on a level with the original

[40] 42 W. Va. 312, 36 L. R. A. 519.

[41] Citing Albany *v.* Sikes, 94 Ga. 30, 26 L. R. A. 653.

[42] Spencer *v.* R. R. Co., 23 W. Va. 405; Hutchinson *v.* Parkersburg, 25 W. Va. 226; Stewart *v.* Ry. Co., 18 S. E. 604.

[43] 2 South. 155.

[44] Citing Reading *v.* Althouse, 93 Pa. St. 400.

[45] 4 South. 700.

[46] (Pa.) *Supra*

[47] 13 South. 504.

street, and built a house on it. The city then raised the grade of the street and backed water on his lot to the depth of six inches. Damages were allowed.[48]

6. MISSOURI.

The construction put upon the words in this state is the same as that of the state of Illinois—the Missouri court expressly following Illinois, in the case of *Rude* v. *St. Louis*,[49] where the court says:

"The section of our constitution as to taking or damaging private property for public use is the same as that of the state of Illinois. The Supreme Court of that state, in *Rigney* v. *Chicago*, in discussing this section of the constitution of that state, used the following language: 'In all cases, to warrant a recovery, it must appear that there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess to that sustained by the public generally'."

The court holds that by the use of the word "damage," the constitutional convention expressed "an intention to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law."

In *Gates* v. *K. C. etc. Ry. Co.*[50] the court says, after citing numerous cases, "The rulings in these cases may be summed up in the language of the first of these cases (*Rude* v. *City of St. Louis*)."[51]

7. NEBRASKA.

In *Gottschalk* v. *C. B. & O. Ry. Co.*[52] the court says: "It is not necessary to entitle a party to recover that there should be a direct physical injury to his property, if he has sustained damages in respect to the property itself whereby its value has been permanently impaired or diminished."

In *City of Omaha* v. *Kramer*[53] it is said:

"Applying this rule [of the "old law, the mischief and the remedy"] to the provision in question, and it embraces all damages which affect the

[48] For other cases see Hooper v. Ry. Co,, 69 Ala. 529; Columbus etc. Ry. v. Witherow, 82 Ala. 190, 3 South. 23; Montgomery v. Maddox, 7 South. 433; Birmingham Ry. Co. v. Ry. Co., 24 South. 368; Mobile &c. Ry. v. Riley, 24 South. 818.

[49] 6 S. W. 257.

[50] 19 S. W. 957.

[51] See also Van De Vere v. Kansas City, 17 S. W. —; Sheehy v. Kansas City Ry., 94 Mo. 574; 4 Am. St. Rep. 396, note; Tunke v. St. Louis, 20 S. W. 1034; Kansas City etc. Ry. v. Dawley, 50 Mo. App. 480; Householder v. Kansas City, 83 Mo. 488.

[52] 16 N. W. 475.

[53] 41 N. W. 295.

value of the person's property. . . In other words, the words 'or damage' in sec. 21, Art 1 of the constitution, include all actual damages resulting from the exercise of the right of eminent domain, which diminish the market value of private property. The fact that damages are consequential will not preclude a recovery if the construction and operation of the public improvement is the cause of the injury; and it is not necessary that the damages be caused by a trespass or an actual physical invasion of the owner's real estate. The test is, excluding the general benefits, is the property in fact damaged?"

In this case, after citing *Ry. Co.* v. *Marchant*[54] as authority for the proposition that consequential damages are not recoverable, the court declines to follow it, and says: "We entertain a high regard for the Supreme Court of that state, but we cannot give our assent to the doctrine above expressed."

In *Chicago etc. Ry. Co.* v. *Hazels*[55] the court cites the *Gottschalk* case,[56] and says, "In the opinion it is said 'It is not necessary to entitle a party to recover,' etc. To that extent we must consider the law of this state settled."

In *Omaha etc. Ry. Co.* v. *Janecek*[57] the court says:

"It has become the settled law of this state, that under the provision of our constitution, it is not necessary that any part of an individual's property should be actually taken for public use in order to entitle him to compensation. If the property has been depreciated in value by reason of the public improvement, which the owner has specially sustained and which is not common to the public at large, a recovery may be had."[58]

It is submitted that the rule that there is a right to recover damages *whenever the market value of the property is depreciated* is too broad. It creates a new liability; one that was not known to the common law, and puts this liability on the corporations. By this rule, if a city erect a jail or a fire engine house on a lot owned by it in a town, and because of the erection of such house the value of the adjoining property is depreciated, the city will be liable in damages. The city has disregarded no right which the adjoining lot owner has by the common law, but is using its property in a legitimate way, and yet, by the construction put upon this clause of the constitution, it is liable. It is submitted that this is not the proper construction. The purpose of the constitution is to protect the rights of the citizen against the encroachment of the corpora-

[54] (Pa.) *Supra.* [55] 42 N. W. 39. [56] (Neb.) *Supra.* [57] 46 N. W. 478.

[58] See also Harman *v.* Omaha, 17 Neb. 548; Schalle *v.* Omaha, 23 Neb. 325, 36 N. W. 583; N. E. Neb. Ry. Co. *v.* Frazer, 40 N. W. 183; Omaha *v.* Buson, 54 N. W. 557; Jaynes *v.* Omaha St. Ry. Co., 74 N. W. 67; Omaha etc. Ry. Co. *v.* Todd, 58 N. W. 289.

tion. In the absence of statutes, the citizen has only those rights which are given him by the common law, and, as that right which can not be enforced is of no value, by the same law he is provided with means of enforcing these rights. By the above construction, the citizen is not protected in the enjoyment of any right which he had, but is given a right as oppressive to the corporation as it is unique in the law. In the opinion of the writer, such a construction is opposed to a sound public policy.

8. Colorado.

In *Gilbert* v. *Ry. Co.*[59] the court says:

"Notwithstanding the broad terms of our constitution and the unqualified expressions of certain judicial opinions, we are not prepared to say that whenever a depreciation in private property is caused by some public or private improvement, the owner of the property thus depreciated may recover compensation against the party making such improvement. It is probable that in consequence of every improvement resulting from new inventions or discoveries the private rights or interests of some person or persons have been damaged or injuriously affected. In many cases the construction and operation of railroads have driven stage companies and post-chaises out of existence, and rendered the property invested therein, as well as the business, comparatively valueless. . . We are not aware, however, that it has ever been contended in such cases that the proprietors of such stage routes have a cause of action against the railroad companies for the depreciation of their property. In such cases, therefore, private property can not be said to be taken or damaged for public use within the sense or meaning of the constitution. It is only when some specific private property, or some right or interest therein, or incident thereto, peculiar to the owner, is taken or damaged for public or private use that the constitution guarantees compensation therefor."[60]

It will be seen that the doctrine of Colorado is practically the same as that of Illinois.

9. Texas.

The case of *Trinity etc. Ry. Co.* v. *Meadows*[61] produced a good opinion and an excellent illustration. In this case the railway was properly constructed, but by reason of its construction, sand was washed by rain into a branch, and thence into Meadows' mill-pond,

[59] 22 Pac. 815.

[60] Citing Denver *v.* Bayer, 2 Pac. 6; Ry. Co. *v.* Nestor, 15 Pac. —; Whitsett v. Ry. 15 Pac. 339; Rude *v.* St. Louis (Mo.), 6 S. W. 257. See also Mollandin *v.* Ry. Co., 14 Fed. 394, citing Rigney *v.* Chicago with approval. See further U. P. Ry. Co. *v.* Foley, 35 Pac. 542; Gilbert *v.* Ry. Co., 22 Pac. 814; City of Pueblo *v.* Strait, 36 Pac. 789.

[61] 11 S. W. 145.

filling up the same to some extent, and clogging the wneel. It was held that there was no legal damage, the injury being too remote.

The court says:

"It may be doubted if our Constitution intended to extend the recovery of compensation beyond the rule here indicated, that is to say, if a railroad company, by condemnation or otherwise, acquires for its purpose a right of way over land, and in constructing its road did an act injurious to an adjacent neighboring proprietor, for which, if done by the original owner, he would be responsible at common law, the company should be liable to compensate the proprietor so injured. We do not understand that it was intended to give an action against those constructing public works for acts which, if done by a person in pursuit of a private enterprise, would not have been actionable."

In *Gainesville etc. Ry. Co.* v. *Hall*[62] there is another good illustration. There was a recovery for diminution in the value of property arising from noise, smoke and vibration produced by the operation of a railroad near the property, though not along the public highway. The court says:

"We are, then, brought to the inquiry whether or not the carrying on of any business by a natural person on his own land, which, by reason of the smoke, noise and vibration caused by the operation of the powerful machinery, materially diminished the enjoyment of the property of another and rendered it less desirab e as a residence and depreciated its market value, is a nuisance at common law. The doctrine announced in *Burdett* v. *Swenson*, 17 Tex., leads inevitably to the conclusion that it is."

Thus, by the *Meadows* case the railroad is not liable unless an individual, in the same circumstances, would be liable by the common law. By the *Burdett* case the operation of the railroad, as operated in the *Hall case,* is a nuisance at common law, therefore the railroad company is liable.

For other Texas cases see the foot-note.[63]

10. California.

The case of *Reardon* v. *San Francisco*[64] is the leading case in California. In this case the city put a fill in the street, and caused the substrata to press out and injure the foundations of the plaintiff's buildings. There was no question as to the proper con-

[62] 14 S. W. 259.

[63] Fort Worth etc. Ry. Co. *v.* Garven, 29 S. W. 784; Limberger *v.* Ry. Co., 27 S. W. 198; Tex. & No. Ry. Co. *v.* Goldberg, 5 S. W. 824; Gulf etc. Ry. Co. *v.* Tuller, 63 Tex. 467.

[64] 6 Pac. 317.

struction of the work, or of the authority to construct. In the opinion the court says:

"To what kind of damage does the word 'damage' refer? We think it refers to something more than a direct or immediate damage to private property, such as its invasion or spoliation. There is no reason why this word should be construed in any other than its ordinary and popular sense. We are of the opinion that the right assured to the owner by this provision of the constitution is not restricted to the case where he is entitled to recover as for a tort at common law. If he is consequentially damaged by work done, whether it is done carefully and with skill or not, he is still entitled to compensation for such damage under this provision. This provision was intended to insure compensation to the owner where the damage is directly inflicted, or inflicted by want of care and skill, as where the damages are consequential, and for which damages he had no right of recovery at common law. We cannot think that the convention inserting in the constitution of the state the word 'damaged' in the connection in which it is found, and the people, in ratifying the work of the convention, intended to limit the effect of this word to cases where the party injured already had a remedy to recover compensation. It was intended to super-add to the guaranty found in former constitutions of this state—a guaranty against damage where none previously existed."

This case, therefore, decides that a *new right* is given. To this doctrine is applicable the criticism made in our comments on the Nebraska construction. In passing, it may be pointed out that the court overlooks the fact that in respect to a large class of injuries the individual was, before the constitution, without remedy. It asserts that the people did not intend to limit the word "to cases where the party injured already had a remedy to recover compensation." In the absence of the words "or damaged," however, there was no such remedy.[65]

11. Louisiana.

In Louisiana, the court, in the case of *Griffin* v. *Shreveport*,[66] follows the Illinois construction, saying:

"A similar article in the constitution of Illinois has recently passed under the review of the Supreme Court of the United States, and it was held that under such provisions a recovery may be had in all cases where private property has sustained a substantial injury from the making and use of a public improvement, whether the damage be direct, or consequential—the doctrine seems to us clearly correct, and we adopt it."[67]

[65] See, also, Vean Daalen *v.* San Francisco, 6 Pac. 689; Weyle *v.* Ry. Co., 10 Pac. 510; Porter *v.* Ry. Co., 18 Pac. 428; De Long *v.* Warren, 36 Pac. 1009. All of these cases follow Reardon *v.* San Francisco.

[66] 6 South. 624.

[67] See also Ponchartrain R. Co. *v.* Comm'rs, 21 South. 765; Hart *v.* Comm'rs, 54 Fed. 559; Ry. Co. *v.* Roberts, 21 South. 630.

12. Washington.

In Washington, in the case of *Brown* v. *Seattle*,[68] the court, in speaking of the clause of the constitution, says:

"After almost twenty years of discussion and decision in Illinois and other states, we put the words 'taken or damaged' into our constitution, and they must have their effect. In *Chicago* v. *Taylor*, 125 U. S., the court said: 'The use of the word "damaged" in the clause providing for compensating owners of private property appropriated to public use, could have been with no other intention than that expressed by the state court. Such a change in the organic law of the state was not meaningless. But it would be meaningless if it should be adjudged that the constitution of 1870 gave no additional or greater security to private property than was guaranteed by the former constitution. If private property is damaged for the public benefit, the public should make good the loss to the citizen.' Question was made in all these cases, as it has been made in this one, whether the addition of the word 'damaged' should be taken to mean anything further than was formerly covered by the word 'taken', but it is manifest that no such construction could be maintained. 'Damaged' does not mean the same thing as 'taken' in ordinary phraseology. The makers of the Illinois constitution used the word in that instrument for some purpose. Other states changed their constitutions for substantially the same purpose. They took the new phrase subject to the general rule of construction that the adoption of constitutional or statutory language by one state from another, adopts to some extent at least, the construction put upon the borrowed language by the court of the state from which it came after almost twenty years."

From this opinion, I infer that when a case comes up requiring the choice of one or the other of the doctrines of Illinois and Nebraska, the Washington court will choose the Illinois construction.

I have been able to find no case in which the exact position of the Washington court has been stated. In the cases cited in the margin[69] the clause in question has been touched on but its limits not defined.

13. South Dakota.

In South Dakota, the first case in which the provision came up for construction was *Searle* v. *City of Lead*.[70] In this case the court does not set forth any clear-cut rule, though it cites with seeming approval *Ry. Co.* v. *Ayres*.[71] In the course of the discussion the court says:

[68] 31 Pac. 313.

[69] Hatch *v.* Ry. Co., 31 Pac. 1063, 1067; Kaufman *v.* Ry. Co., 40 Pac. 317; Spokane *v.* Colby, 48 Pac. 248.

[70] 73 N. W. 101.

[71] 106 Ill. 518.

"The framers of our organic law must be presumed to have been familiar with the provisions in the earlier state constitutions, and of the many cases in which private property had been, in effect, taken for public use for which the property owner seemed to have no redress; and it is quite manifest that they inserted the term 'or damaged' for the express purpose and object of protecting private property from the arbitrary exercise of municipal and other corporate power. The constitutional provision is unquestionably a wise one and well calculated to protect property owners from injustice and wrong on the part of municipal and other corporations and individuals invested with the privilege of taking private property for public use, and should be given a liberal construction in courts in order to make it effectual in the protection of the rights of the citizen.

"The words 'or damaged' were, without doubt, added to the usual provisions contained in earlier constitutions for the purpose of extending the remedy to incidental or consequential injuries to property not actually taken for public use in the ordinary acceptation of that term. And the same was adopted by the people with this express guaranty that the just compensation should be made for property so taken or damaged for public use. The words 'or damaged' are found in the later constitutions of several of the states, among which are Illinois, Missouri, Nebraska, Pennsylvania, California and West Virginia, and the construction we have placed on the words is fully sustained by the courts of these states."

There seems to be no other case in South Dakota which discusses the meaning of the provision, and this case is very unsatisfactory. Just what the court means by "incidental or consequential injuries" I am unable to say.

14. MONTANA.

Montana follows Nebraska, in the case of *Root* v. *Butte etc. Ry. Co.*[72] The court says:

"We do not mean to hold that the plaintiff may not be entitled to recover for such damages as he may have specifically sustained by reason of the public improvement, and which are not common to the public at large. On the contrary the weight of authority is that under a constitutional provision such as sec. 14, Art 3, of the constitution of Montana, to the effect that private property shall not be taken or damaged for public use without just compensation having been first made or paid into court for the owner, it is not necessary that there be any physical invasion of the individual's property for public use to entitle him to compensation. *R. Co.* v. *Janecek*, 30 Neb. 378. We believe that if the plaintiff's property has been lessened in value by the running of trains, or by smoke or whistles or noise of locomotives, or in other ways on account of the construction and operation of appellant railroad in close proximity to his property, and such damage is in excess of that sustained by the community at large, he has sustained specific damages and a recovery may be had."

[72] 31 Pac. 155.

15. Mississippi.

In *Mayor of Vicksburg* v. *Hiernan*[73] the provision in the constitution is considered in a case of alteration of street grade, and the court says, after quoting the provision:

"The italicised words above appear in no former constitution of this state, and must receive such construction as will effectuate the object designed to be attained by their insertion into the constitution. Under our former constitution, which provided only for due compensation to the owner for taking private property for public use, it had long been held that to entitle the private owner to compensation for the taking of his property for public use, there must be an invasion of the property, a trespass upon and an appropriation of it, to public use. There must have been formerly that which amounted to a deprivation of the owner of his property, and merely consequential injuries resulting from the loss or impairment of some right incident to the use and enjoyment, there being no invasion of the property itself, were not covered by the constitutional provision. Such was the law as understood and applied before the incorporation in the constitution of the words we have referred to. We are not to suppose that the framers of the new constitution employed these additional words, all embracing in their signification and far-reaching in their application, aimlessly or unadvisedly. As the law therefore was, the taking of private property for public use without due compensation to the owner was inhibited and the rights of the private person sufficiently guarded. But we are bound to suppose that, in the judgment of the framers of the new constitution, wrongs were committed by those exercising the right of eminent domain for which there was no legal redress, and hardships endured by the citizens for which there was no remedy.

"The citizen must now be held, under the new provision of our fundamental law, to be entitled to due compensation for, not the taking only of his property for public use, but for all the damages to his property that may result from works for public use.

"The absolute justice of the rule which forbids an invasion and impairment of the citizen's rights to the use and enjoyment of his property, as well as the actual taking of such property, without compensation, is to our minds beyond controversy.

"But there is another consideration which presses on us with overwhelming force in the discussion of this question. The new language employed in our constitution was incorporated in it by the august body which framed that instrument, with full knowledge of the interpretation put upon like words found in the remodeled constitution of sister states by the highest courts and by the Supreme Court of the United States.[74]

The doctrine of Mississippi is, therefore, that there is a right of action wherever any legal right of the citizen has been disregarded.

[73] 16 South. 434.

[74] Citing Rigney *v.* Chicago (Ill.); Ry. Co. *v.* Ayers (Ill.); Chicago *v.* Taylor (U. S.); Werth *v.* Springfield (Mo.); and Atlanta *v.* Green (Ga.), all *supra*.

This is practically the same as the doctrines of Illinois, Pennsylvania, Georgia, Missouri, and other states.[75]

16. KENTUCKY.

In Kentucky the question was fully considered in the case of the *City of Henderson* v. *McClaim*.[76] In this case it was held that direct physical injury to property in order to establish a claim for damages is unnecessary. The court cites Dillon's Municipal Corporations,[77] holding actual trespass, taking or invasion necessary to a right of action, as correctly stating the former rule, but adds:

"While the rule under the former constitution has been held, as in the section quoted above from Dillon, it has been held in numerous cases that the new rule introduced by the present constitution required compensation in all cases where it appears that there has been some physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it additional value, and that by reason of such disturbance he has sustained special damages with respect to his property in excess to that sustained by the public generally."[78]

The case of *Louisville Ry. Co.* v. *Foster*,[79] decided in 1900, is also a good example of the working of the Kentucky rule. In this case the plaintiff sought to recover for inconvenience from the noise made in the operation of a street railway and turntable in front of her house. The court says:

"The court should have told the jury that appellee, as owner of city property, fronting on the street, must submit to all those noises, smells and disturbances that are usual in city life, including the use of the highway by the street railway, in so far as they were reasonably incidental to the operation of a street railway in a city, and borne by the public generally, and that so far as the injury complained of arose from these causes there could be no recovery; but that she could recover for any substantial injury to her property arising from the location or operation of the turntable or cars that was caused by such noises, smells and disturbances as were not fairly incidental to the usual operation of such a street railway and homes by the property owners generally along the line."

In other words, she could recover when the street railway was operated in such a way as to become a nuisance.[80]

[75] See also Raney v. Hinds County, 28 South. 875; Richardson v. Levee Commr's, 9 South. 351.

[76] 43 S. W. 700.

[77] Sec. 990.

[78] Quotation from Rigney v. Chicago (Ill.).

[79] 57 S. W. 480.

[80] See also Carrico etc. Ry. Co. v. Calum, 17 S. W. 854; Ashland etc. Ry. Co. v. Faulkner, 45 S. W. 235; City of Ludlow v. Detwiller, 47 S. W. 881; C. & O. R. Co. v. Rice, 50 S. W. 541; L. & N. Ry. Co. v. Brinton, 58 S. W. 604.

Kentucky follows the doctrine of Illinois as set forth in *Rigney* v. *Chicago.*

In the four states of Arkansas, North Dakota, Utah and Wyoming no decisions were found discussing the provision in any adequate fashion.

COMMENTS ON JUDICIAL INTERPRETATIONS OF THE CLAUSE.

From this survey of the decisions in the various states, it will be seen that the doctrines vary greatly. For example, in Illinois, in *Rigney* v. *Chicago,* the doctrine is laid down that a right of action exists only where, in the absence of statutory enactments, *an action would lie by the common law.* On the other hand, in California, in *Reardon* v. *San Francisco,* the right of action is said not to be restricted to cases in which there would be a right of action at common law.

Of these two opposing doctrines it is evident that both cannot be correct. Both may be wrong, but both cannot be right.

Between the doctrines of Illinois and Pennsylvania there is practically no difference. The Pennsylvania court holds that the effect of the provision is to put the corporation on the same footing as the individual in respect to liability. The Illinois court holds that there is liability in all cases where, but for some legislative enactment, an action would lie by the common law. The legislative enactment here meant is one authorizing the carrying on of the business in which the corporation is engaged. If this statutory license be taken away, the corporation is left on the same footing as the individual, in respect to liability.

By way of criticism of the wording of the Illinois rule, it may be said that the liability should not be restricted to what it was at *common law.* If there is in effect in the state any *general statute* imposing liability in general terms, no reason is seen why this should not apply to all alike, and it is believed that this would be the effect under the Illinois rule.

Let us look now at the doctrine in those states which maintain that there is a *new right of action given.* In Nebraska, for instance, it is held that the words "or damaged" include "all actual damages resulting from the exercise of the right of eminent domain *which diminish the market value of private property.*" It is sub-

mitted that this is not the correct doctrine; that it was not the purpose of the framers of the constitution to introduce new liability into the law.

In the words of Simmons, C. J., in the case of *Austin* v. *Terminal Co.*,[81] every man has

"A right to the reasonable use and enjoyment of his property; and if in such case, without negligence or malice, a loss unavoidably falls on his neighbor, he is not liable to damages therefor. If the construction contended for [that prevailing in Nebraska] be correct, then we have a liability imposed upon corporations in the operation of their works, which is not, and never has been, imposed upon individuals. No principle of law is better settled than that a man has the right to the lawful use and enjoyment of his property, and that if, in the enjoyment of such right, without negligence or malice, an inconvenience or loss occurs to his neighbor, it is *damnum absque injuria*. This must be so, or every man would be at the mercy of his neighbor in the use and enjoyment of his own. The rightful use of one's own land may cause damage to another without any legal wrong."

This being the law as to the use of his property by an individual, no reason appears why the same rule should not be applied in the case of the use by a corporation of its own land.

If the rule in Nebraska be correct, a city, as heretofore suggested, would be liable to the surrounding property-owners for erecting, on a town lot owned by it, a jail or a fire-engine house, and thereby making the surrounding property less valuable, though the city has injured no right belonging to the adjoining owners. A railroad company would, under this rule, be liable for the depreciation in the value of surrounding property, caused by erecting on the land belonging to the railroad a depot for the accommodation of the public. And all this would be entirely irrespective of the question of nuisance. In other words, under this rule, a corporation acting on its own property, and within its right, and not transgressing the right of any one by nuisance or otherwise, would be liable to a property-owner, none of whose rights it has injured. Simply to state this proposition—the inevitable result of the holding of the court—is to show its unsoundness.

On the other hand, the effect placed on the provision in Pennsylvania, Illinois, Georgia, and other states following these, commends itself to one's ideas of justice and of common sense. By

[81] (Ga.) 47 L. R. A. 755.

the rule in these states, the *corporation* is liable *only where the individual would be liable under the same circumstances.*

On principle, the liabilities should be the same. Certain corporations are given, by the state, the right of eminent domain. The original constitutional prohibition was against the "taking" of private property in the exercise of this power, without the payment of just compensation. All injuries to property are either "takings" or "damagings" of such property, and of the "damaging" of the property the constitutions were silent. The state, in authorizing these corporations to carry on their business, gives them license to do acts which are damages to property, and which, but for the license of the state, would give to the individual the right to an action at common law to redress the wrongs.

In this state of affairs, the constitutional provision comes and declares that private property shall not be either taken "or damaged" without the payment of just compensation—providing, in other words, that there shall be *no disregard of any property rights* without compensation.

The result of this is, that, since the legislature is subordinate to the will of the people, as expressed in the constitution, the license given to corporations by the legislature is no protection to them. This license, which, at one time, gave them immunity from suit, can no longer have that effect.

The result is, that since the corporation is liable for either the "taking or damaging" of the property, its liability is the same as that of the individual.

No reason is seen why this should not be the case. No reason has been advanced by the courts holding the other opinion why the liability of the individual and of the corporation should not be the same. An act done, which has effect on a man's property rights, is a legal injury, or not a legal injury, irrespective of whether it was caused by a corporation or by an individual.

The clause was put into the constitution to protect the citizen, and supposes some legal right on the part of the citizen which may be transgressed. When it provides that his property shall not be taken or damaged unless paid for, it has in view these legal rights, and gives him a claim to compensation only when some of these rights are disregarded. In no sense is it needful in protecting him in the enjoyment of his existing rights, to *give him a new right,*

which, before the constitutional provision, was unknown to the law.

This construction, given by the Illinois and Pennsylvania courts, is not open to the same objections, based on inconvenience and public policy, as may be urged against the Nebraska rule and others of the kind.

It may be objected to the Pennsylvania doctrine that, under this ruling, a railroad company, for instance, "might so conduct its business as to render nearby property uninhabitable, drive the owner from his dwelling, and absolutely destroy its value." To quote from the opinion in *Austin* v. *Terminal Co*:[82]

"When such a case arises the owner would not be without redress, and that too whether the road had, in the first instance, condemned the land and paid damages or not. Payment of damages in condemnation proceedings, presupposes subsequent lawful, usual and ordinary operation, not the creation of a nuisance. But the courts can certainly take judicial cognizance that the lawful operation of a railroad does not render property uninhabitable nor drive the owner from his premises. The unlawful use may do so, and for such unlawful use the law not only awards damages, but it adjudges that the nuisance shall be abated; but it has no remedy for the diminution in value occasioned by the lawful use of adjacent property, whether that use is by a railroad, or factory, or the erection of some unsightly but lawful structures.

"The marked difference between the lawful and unlawful use of railroad property and the different consequences flowing therefrom, are discussed in *B. & P. Ry. Co.* v. *Fifth Baptist Church*.[83]

"There the company's round-house was located close to the church building. In this round-house many engines were housed, cleaned, fired up, steam blown off; the act of blowing off steam frequently occupied from five to fifteen minutes; hammering noises were made in the workshop and other wrongs were committed, including the building of sixteen smoke stacks, lower than the church windows, and so placed that the smoke therefrom poured directly into the audience room. 'The engine house and repair shop, as they were used by the railroad company, were a nuisance in every sense of the term, and the liability of the company to respond in damages was not affected by its corporate character.' The court thereupon laid down and applied the law of nuisance, wholly independent of the question of 'taking or damaging property for public use', but it distinctly recognized that so far as the usual and necessary noises which were occasioned by the operation of the railroad is such, and in the performance of its public duty, a property owner could not recover."

By the Pennsylvania rule the corporation and the individual are put on the same footing. What is a nuisance in one case is a

[82] (Ga.) 47 L. R. A. 755, 763.

[83] 108 U. S. 317.

nuisance in the other. If an individual, without any statutory authority, built a railroad on his own property and in the operation of the railroad caused damage to an adjoining property owner, he would be liable. Since the individual has not the statutory provision to prevent the operation of his railroad from being a nuisance, the adjoining property owner would be able to maintain an action, if he could prove the railway a nuisance by the common law. Under the constitutional provision, what could not formerly be objected to as a nuisance, when done by a corporation having the power of eminent domain, because of statutory license, can now be objected to, if the same thing when done by an individual might be ground for objection. To quote again, an example is given in *Austin* v. *Augusta Terminal Co.*:[84]

"If, prior to 1877, a manufacturing company had obstructed the street and thereby inflicted special damages, a property owner so injured could recover; but if identically the same act had been done by a municipality under its charter, it would have been just as much 'damage', though the property owner could not recover, because the state's license to obstruct the street was authority for what had been done—a shield and protection affording immunity from what would otherwise have been liability. . . . The constitution intended to take away the city's exemption, and to leave it and the manufacturing company on an equal footing, ordering that *hereafter 'damages', by whomsover caused, and even if for public use, should be paid.*"

No good reason has been shown by any decision why the liability of the citizen and the corporation should not be the same, and no answer has been made to the argument based on the inconvenience and injustice, not to say absurdity, which is the logical result of the rule that there is a right of action whenever the market value of the property is lessened.

RÉSUMÉ.

That the weight of authority is on the side of the Illinois and Pennsylvania rule has been shown. The result may be summarized thus:

(1) Following Illinois, are: Missouri, Colorado, Mississippi, Louisiana and Kentucky. Washington shows a tendency to follow Illinois.

(2) Following Pennsylvania are: Georgia, West Virginia and Texas. Alabama also approximates the Pennsylvania doctrine.

[84] (Ga.) *Supra.*

(3) A third group is composed of Nebraska, California, Montana, and presumably South Dakota, though the doctrine in the last-named state is so indefinite as to make it hard to assign its position.

It has been attempted to show that the rule in Illinois is practically the same as that in Pennsylvania. The construction put on the words "or damaged" by the courts of these states is in accord with principle, justice and common sense, and is supported by the weight of authority.

CARL H. DAVIS.

University of Virginia.